

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

VANTAGE FINANCIAL SERVICES, INC.,

Plaintiff,

Index No. 04-11686 (WGY)

-against-

NON-PROFIT SERVICE GROUP, INC. AND
GEORGE E. MILLER,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE
DISMISSAL AND TO ENTER JUDGMENT IN THE AMOUNT OF \$250,000**

Pursuant to Fed. R. Civ. P. 60(b)(6), plaintiff Vantage Financial Services, Inc. (“Vantage”) moves this honorable Court to vacate an order of dismissal entered on or about January 30, 2006 (the “Order of Dismissal”), and to enter judgment against defendants Non-Profit Service Group, Inc. and George E. Miller (collectively, “Defendants”) in the amount of \$250,000 plus interest going forward, on the grounds that the parties agreed in their settlement agreement (the “Settlement Agreement”) that if Defendants did not make payment of \$250,000 within one year from the date of the Settlement Agreement, Vantage could apply to the Court for the relief sought herein. Defendants have failed to make any payments to Vantage whatsoever.

BACKGROUND

On or about July 13, 2004, Vantage sued Defendants in Suffolk Superior Court for various claims related to legal malpractice. Shortly thereafter, on July 30, 2004, Defendants removed the case to this Court. *See* Docket Entry No. 1. For the following year and a half the parties litigated this action right up to the eve of trial in January, 2006, at which time they

agreed to settle the matter. Accordingly, on January 30, 2006, the Court entered a settlement order of dismissal (the “Order of Dismissal”). *See* Docket Entry No. 30.

On or about March 1, 2006, Defendants signed the Settlement Agreement, a copy of which is attached as Exhibit A to the accompanying Affidavit of Harry Melikian (the “Melikian Aff.”). *See* Exhibit A at 6. Vantage signed the Settlement Agreement on March 13, 2006. *Id.* at 5. Pursuant to the Settlement Agreement, Defendants jointly and severally agreed to pay Vantage the sum of \$250,000 (the “Settlement Payment”). *Id.* at 3. The Settlement Payment was due on the first to occur of (i) twelve months from the date of the Settlement Agreement, or (ii) the receipt of proceeds from any sale of real estate subsequent to the date of the Settlement Agreement. *Id.* Further, the parties agreed that if the Defendants defaulted in the performance of the Settlement Agreement, Vantage could apply to the Court for (i) vacation of the Order of Dismissal, and (ii) entry of a \$250,000 judgment against Defendants:

In the event of a default by Nonprofit and Miller in their performance of this Agreement, Vantage shall have the right to apply to the Court to vacate the dismissal of the Action and to entry of a judgment against Nonprofit and Miller in the amount of the Settlement Payment.

Id. at 4 (emphasis added).

To date, Defendants have not paid a single penny in satisfaction of the Settlement Payment, notwithstanding defendant Miller’s apparent significant real estate holdings. *See* Melikian Aff., ¶ 5.

ARGUMENT

I. AS PER THE SETTLEMENT AGREEMENT, THE COURT SHOULD VACATE ITS ORDER OF DISMISSAL AND ENTER JUDGMENT AGAINST THE DEFENDANTS IN THE AMOUNT OF \$250,000

Pursuant to Fed.R.Civ.P. 60(b)(6), the Court has the authority to vacate the Order of Dismissal, as the parties agreed in the Settlement Agreement:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:...(6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(6). While a motion for relief under Fed.R.Civ.P. 60(b)(1)-(3) must be made within one year, a motion for relief under Fed.R.Civ.P. 60(b)(6) must be made "within a reasonable time." *Rivera v. Puerto Rico Tel. Co.*, 921 F.2d 393, 395 (1st Cir. 1990).

In *United States v. Baus*, 834 F.2d 1114, 1121 (1st Cir. 1987), the First Circuit found "extraordinary circumstances" justifying relief under Fed.R.Civ.P. 60(b)(6) from the execution of a judgment against the guarantors of a loan, after the government materially breached its settlement agreement with the guarantors. The First Circuit held that a material breach of a settlement agreement is sufficient to warrant relief under Fed. R. Civ. P. 60(b)(6):

This accords with the purpose of Rule 60(b)(6). "Where the [settlement] agreement is made, as here, under the eyes of the court, it is a most solemn undertaking, requiring the lawyers, as officers of the court, to make every reasonable effort to carry it through to a successful conclusion." *Warner v. Rossignol*, 513 F.2d 678, 682 (1st Cir. 1975). Material breach of such a solemn obligation presents an extraordinary situation of permitting a party to benefit from a judgment the terms of which it has deliberately disregarded.

Id. at 1124. See also *Keeling v. Sheet Metal Workers Int'l Assoc.*, 937 F.2d 408, 410 (9th Cir. 1991) ("Repudiation of a settlement agreement that terminated litigation pending before a court constitutes an extraordinary circumstance, and it justifies vacating the court's prior

dismissal order”); *Fairfax Countywide Citizens Assoc. v. County of Fairfax*, 571 F.2d 1299, 1302-03 (4th Cir. 1978) (“upon repudiation of a settlement agreement which had terminated litigation pending before it, a district court has the authority under Rule 60(b)(6) to vacate its prior dismissal order and restore the case to its docket”); *Aro Corp. v. Allied Witten Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) (order of dismissal vacated under Fed.R.Civ.P. 60(b)(6) where party failed to abide by terms of settlement agreement; “The court below had not only the inherent power but, when required in the interests of justice, the duty to enforce the agreement which had settled the dispute pending before it.”).¹

Vantage seeks to vacate the Order of Dismissal and to enter judgment in the amount of \$250,000, as provided in the Settlement Agreement. This motion has been made in a timely fashion, as the Settlement Agreement provided Defendants with, at most, one year to make the \$250,000 Settlement Payment, and just over one year has elapsed since the parties signed the Settlement Agreement. The entire basis of the Settlement Agreement was the Defendants’ agreement to make the \$250,000 payment. Over a year later, Defendants have inexplicably failed to make the Settlement Payment, notwithstanding the fact that Defendant Miller apparently has substantial real estate holdings, believed to be in excess of \$1.3 Million. This refusal to make the Settlement Payment is a material breach of the Settlement Agreement and warrants relief under Fed.R.Civ.P. 60(b)(6).²

¹ *Cf. Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140-41 (3d Cir. 1993). In *Sawka*, the Third Circuit affirmed District Court’s order refusing to reopen case pursuant to Fed.R.Civ.P. 60(b)(6), on the grounds the appellant could bring a new claim for breach of the settlement agreement. This case is distinguishable from *Sawka*, insofar as the Third Circuit found that there was no indication the court would retain jurisdiction over the claim, whereas the parties herein specifically agreed in the Settlement Agreement that Vantage could apply to the Court to reopen this case and enter judgment in the amount of the Settlement Payment.

² In the alternative, Vantage could bring a second action against the Defendants in this Court, in which it would (i) ask the Clerk of the Court to deem the new case related to this case pursuant to Local Rule 40.1(G)(1), and (ii) likely end up back before this Court. This seems to be the least efficient means of

In addition, Vantage respectfully requests that the Court order Defendants to pay all legal fees incurred with the making of this motion. On March 20, 2007, counsel for Vantage sought the assent of Defendants to this motion, but no such assent was forthcoming. As a result, Vantage has incurred and continues to incur legal fees, notwithstanding the terms of the Settlement Agreement.

CONCLUSION

Based on Defendants' material breach of the Settlement Agreement and Defendants' previous agreement to vacate the Order of Dismissal and for the entry of judgment if payment were not made, Vantage Financial Services, Inc. respectfully requests that this Court vacate the Order of Dismissal, enter judgment against Defendants Non-Profit Service Group, Inc. and George E. Miller in the amount of \$250,000 plus interest going forward and the legal fees associated with making this motion, and grant such other relief the Court deems just and proper.

Dated: March 21, 2007

Respectfully submitted,

VANTAGE FINANCIAL SERVICES, INC.,

By its attorneys,

/s/ Joseph J. Koltun
 William F. Macauley (BBO# 310060)
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addressing Defendants' non-payment and would only force Vantage to expend further resources in circumstances in which there is no defense.

CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a true and accurate copy of the foregoing
*Memorandum of Law in Support of Motion to Vacate Order of Dismissal and to Enter
Judgment in the Amount of \$250,000*, to be served electronically and by first-class United
States mail postage prepaid on March 21, 2007 to the following address:

Matthew J. Griffin, Esq.
Richard L. Nahigian
Peabody & Arnold LLP
30 Rowes Wharf
Boston, MA 02110

/s/ Joseph J. Koltun
Joseph J. Koltun (BBO #641117)